Petition

81-1364

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ALEXANDER L. STEVAS,
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No.....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MARY JANE EATON,

Petitioner,

vs.

DRAKE UNIVERSITY AND

UNITED STATES GOVERNMENT,

Respondents.

NUISANCE & DAMAGE ACTION

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES SUPREME COURT

FROM THE EIGHT CIRCUIT COURT OF APPEALS.

Mary Jane Eaton

2510 Forest Ave.

Des Moines, Iowa 50311

(515) 277-2340

Pro Se

QUESTIONS PRESENTED

1. Whether my rights guaranteed under the United States Constitution to a jury trial can be denied; Article VII U. S. C.

2. Whether my rights guaranteed under the U. S. Constitution to due process can be denied; Article XIV U. S. C.

3. Whether because of Federal Loan Funding the court should take a deeper look at, Grant File, McAnallen's Affidavit, Progress Reports; Title I U. S. C. Sec. 104 (P.L. 88-204).

4. Whether the construction of the Air Conditioning Unit began before or after the environmental laws went into effect & whether the envirionmental impact statement should be filed; Title 42 Sec. §1858.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS.

The only parties to the proceedings to this case before the 8th Circut Court of Appeals are the parties listed in the caption for this petition.

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In The Supreme Court of the United States

October Term, 1981 NO .....

Mary Jane Eaton, Petitioner

vs.

Drake University & United States Government,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

The petitioner respectfully pray that a writ of certiorari issue to review the judgment & opinion of the United States Court of Appeals for the 8th Circuit entered in this proceeding.

OPINIONS & ORDER BELOW.

The order of the 8th Circuit United States Court of Appeals affirmed the District Court judgment is printed as Appendix A.

The opinion of the United States District Court Southern District of Iowa Central Division is printed as Appendix B.

JURISDICTION.

The opinion of the 8th Circuit Court of

Appeals was entered on Nov. 3, 1981.

Jurisdiction in this Court is U. S. C. Article VII, XIV, .42 U.S.C Sec. 1858, Rule 17 .1 and U.S.C. Title I Sec. 104 (P.L.88-204).

STATUTES INVOLVED.

1. Article VII United States Code Page LI; "In suits at Common Law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried to a jury, shall be otherwise reexamined in any other Court of the United States, than according to the rules of Common Law." 2. Article XIV U.S.C.A. Page 4 which provides(Sec.I) "All persons born or naturalized in the United States, & subject to the U. S. & of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or innunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Federal question first presented in Iowa Supreme Ct. "by motion to dismiss without prejudice for lack of jurisdiction", "states to the court that the trial ct. should have dismissed plaintiff's case without prejudice for lack of jurisdiction since the Iowa State Ct. system lacks jurisdiction to hear the case because the United States is a required defendant. Since the United States is a required defendant jurisdiction is only proper in the Federal Ct. System. The U. S. Government is a required defendant because the Fine Arts Bldg. air Cond. unit received federal loan funding under Title I U. S. C. Sec. 104 & U. S. government by virtue of it's regulatory supervision & approval of the project is a particiant in the objectionable & improper result coming from Drake's air Cond. unit.

Futhermore the Federal Government approved the design of the air cond. unit without first requiring Drake University to draw & submitt to the Enviromental Protection Agency the required Enviromental Impact Statement as required under Title 42 U.S.C. Sec. § 1858 since construction commenced subsequent to the effective date of this Federal Environmental legislation requiring a Environmental Impact Statement prior to the commencement of construction". The above motion filed June 25, 1980 in my appeal to the Iowa Supreme Ct.

On July 21, 1980 the Iowa Appeals ct.filed this order, "the court notes Plaintiff has filed application for futher review of Ct. of Appeals decision. It is ordered that P's motion to dismiss shall be considered by this court together with her application for furtherreview. Resistance if any, to the motion may be incorporated within any resistance to the application." On July 22 '80 defendant requested &received extention of time to resist plaintif's

motion to dismiss, motion was "overruled and denied", my constitutional rights were briefed in the Iowa Supreme Court Page 11.(brief).

The case is a nuisance & damage action against Drake U. (U. S. Government added later) for the operation of a large air conditioner at Drake's Fine Arts Complex which a federal grant was received for the project, about 130 feet from my homestead. My self & family first objected to the construction of the project at the Des Moines Plan & Zoning Public Hearing on Feb. 6, 1969 thru our attorney, it was a"qualified objection " (the site map doesn't show air c.) this was done knowing of objections. Drake was notified on Aug. 2, 1972 about this nuisance & requesting it be abated. (Pursuant Code of Iowa Ch. 657.1 Nuisance) "whatever is injurious to health indecent or offensive to the senses, or an obstruction to the free use of property, so as essentially interfere with the comfortable enjoyment of life or property is a nuisance,

in a civil action by ordinary proceedings may be brought to enjoin & abate the same and to recover damages sustained on account thereof."

Starting in the early fall of 1972 I repeatedly requested that a law suit be initiated immediately & that I wanted a jury trial. On April 11, 1975 I requested for jury trial in writing to my attorney, (Pursuant to Article VII U. S. C. right to jury trial was denied.)

My petition & Original Notice was filed April 15, 1976, more than 4 months later Drake filed their answer, should have been filed within 20 days of Original Notice & Petition; (Pursuant to Iowa Rules of Civil Procedure # 53, Iowa Ct. Rule; Page 27; "Time for Special Appearance, Motion or Answer, within 20 days after service of the Original Notice & Petition upon such defendant." A defefault judgment order should have been issued against defendant. The Daily Record, Polk Co. Offical Paper of record had listed this suit for tri-

al by jury for over 6 months with no objection from defendant. The case was set for jury trial in Apr. of 1978 on short notice without consulting me in advance whether the trial date was o k, my son and witness Michael Eaton wasn't sure he'd beable to get time off work since it had to be done in advance, he then arranged to get off work booked airline space for the trial. I then learned the case had been postponed by my atty. until early June even tho I wanted to go to trial in Apr. My son again arranged time off work etc. & the trial was postponed again after it was learned he would be present, then a trial or hearing was set for late June on very short notice when my son arrived in Des Moines we were told that it had been canceled. In mid July 1979 I was informed by my atty. Drake had unilaterally set trial without jury for July 23, 1979, knowing full well my son was scheduled to take the California bar Exam, on July 24, '79 the same July I was told I couldn't have jurytrial

because of a year old ruling I had never seen before & that I lost my right to jury trial in spite of the fact it had previously been set for jury trial then it was to late to appeal to the Iowa Supreme Ct. before trial because the time for appeal was past.

Mr. Cooney's Aug. 7, 1979 affidavit states he would take my witness & son's testimoney however it was't taken & included in the record, (Pursuant to ArticleXIV U.S.C.A. due process.) Actions where moneydamages are sought are triable to a jury; All Am. Airway v Village of Cedehurst, 15 F.R.D. 490. I was represented by three different attorneys in the trial court and had one attorney for about 2 weeks in the Iowa Supreme Court. I am a widow, older person, have worked about 40 years and about to retire on very limited income. All settlement agreements drawn up by the attorneys were biased very heavily in favor of Drake Univ. I have been flexible &

diligent in searching for a workable solution to this problem. There have been loud explosions from transformers that are located between my home & the Fine Arts Complex. There was conflict of interest on the part of the Judges.

I

THE COURT OF APPEALS SHOULD BE REVERSED FOR HOLDING THAT BOTH DISTRICT COURTS CONCLUSIONS ARE NOT ERRONEOUS.

Supreme Court Rule 17.1(a) provides that when a federal Ct. of appeals has so far departed from the accepted & usual course of judical proceeding & so far sanctioned such a departure by a lower court. The defendant's "Pre Argument Supplement Statement" was served to me 30 days late, Ct. of Appeals decided the case before Appelle had even mailed their brief's, there was substantial evidence that would reverse the courts decision. I advised the court that I didn't understand their settlement program also I am not allowed to have an attorney represent me. The

district ct. was allowed to issue Summary Judument ruling for defendant with insufficent information on McAnallen's affidavit(May '81) thereby bringing into play Rule 17.1(a) of this court. Supreme Ct. provides that one reason a writ of certorari may be granted is a "State Ct. or Fed. Ct of Appeals had deceided an important question of federal law which has not been but should be settled by this Ct." The first question presented for review involves the blatant denial of my constitutional rights to jurytrial & due process. Defendants introduced evidence at trial which purported to establish the Air conditioning unit was not a nuisance. No evidence what so ever was introduced insupport of the validity of my complaint. The June 6, 1978 pre trial hearing & the July 23, 1979 trial had severe adverse impact on this case. Both district cts & courts of appeal in their opinion's failed to address the admitted facts of the operatin of the air condition unit, the federal

loan(U.S.C. Title I Sec. 104 P.L. 88-204 & a copy of minutes of the Feb. 6, 1969 Des Moines Plan & Zoning Public Hearing filed in this proceeding, there by bringing into play Rule 17.1(c) of this court.

The Supreme Ct. may grant a petition for certiorari & reverse the judgment below or vacate the judgment & remand & order the appropriate injunctive relief or any number of things. If the decision below is allowed to stand it will mean that the courts below will be permitted to practice ignoring peoples constitutional rights to a jury trial, due process & property rights.

II

THE SUPREME COURT HAS PREVIOUSLY GRANTED CERTIORARIA ON THE ISSUE OF DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In a case involving procedural safeguards to protected interests, a writ of certiorari was granted in Harrah Independant School Dist v Martin 440 U. S. 194 99 S ct 1062; another case, "Very least which due process of law

requires is an orderly proceeding adapted to the nature of the case, in which citizen has an oppertunity to be heard, or to defend, enforce & protect his rights", Application of Chinn, (1963), 246 N Y S 2d 306, 41 Misc 2d 641. This court granted Certiorari, "the courts below erred in denying petitioner the jurytrial guaranteed him by the 7th Amendmendt & the judgment is reversed." The federal policy favoring jurytrial is of historical & continuing strenth, Simler v Conner, 83. 609, 372 U. S. 221, The Supreme Court was fully aware of the terms & conditions of Title I Sec. 104 P.L. 88-204 U.S.C. when it was established.

III

THE DECISION BELOW IGNORED THE UNSETTLED 3rd AND 4th QUESTIONS PLUS THE FOLLOWING.

Because of the federal loan the courts should have taken a deeper look at McAnallen's May 21, 1981 affidavit it does not show when the money was paid or to whom & on what dates

for this construction. There was insufficent information on the affidavit for the court to make a summary judgment ruling for defendant. The Progress Report paper work attached to the affidavit is misleading or in correct, my personal observation was that there was construction going on in the early spring of 1972. I live there & I saw no visible evidence of the cooling tower had taken place until early 1972. All the progress reports need to be examined, need to see progress reports #12, 14, 15, 17, 19, 20, 22, 23, 24. The air Cond. unit was not fully completed & tested as a unit until late June or early July 1972, testing is part of the construction. My case isn't moot because substantial construction was done on the Fine Arts Complex of which the cooling tower is an integral part, during 1972 after the environmental impact law went into effect.

A memorandum dated Feb. 8, 1972 in Drake's grant file from Ass't. Sec. for Grant Adm.

Policy states, "the NEPA of 1969 P. L. 91-190 42 U.S.C. sec. 4321 4347, requires Federal agencies to consider the propable environmental consequences of any major Fed. action. This includes construction projects supported in whole or in part thru. Fed. contracts, grants, subsidies, loans or other forms of funding assistance. Therefore all applications for HEW assistance for construction shall be accompanied by the applicant's own environmental assesement". If the air conditioning unit was not a nuisance why did Drake erect another air cond. unit at the southeast end of the Fine Arts Complex in early July 1980?

Some of the other conditions adjoining my homestead to the south(1369-26th St.) is an unkept animal behavior house, it's condition causes my home to be infested by various insects & rodents, property west of me at this site has become a dumping ground, east of my house is the alley, a semi truck

jackknifed up to my home (see Exhibit E. filed in this proceeding it also includes pictures of the Fine Arts Air Cond. Unit, on Sept. 29, 1980), an 80,000 pound oil truck (twin trailer) ascending the alley on a sheet of ice, both making deliveries to the Fine Arts Complex, large school buses pausing in the alley while looking for a place to park, exhaust fumes drift in my home. A copy of the alley status dated March, 3, 1969 is in proceeding for this site.

The violations of the Des Moines City Health code Article II; 14.3. Trial court Judge Holliday's letter notifying the attorneys (July 12, 1977) I had made inquiry as to why my case had not come up for trial & my July 23, 1979 letter to Judge Holliday & given to him befor trial began on July 23, 1979.

The evidence in support of a jury verdict is not insufficent; see 8th Cir. Ct. rule 14. I respectfully submit that it is crucial not

to allow such a situation to continue to exit.

CONCLUSION

For the reasons stated above, I respectfully submit that a writ of certiorari should issue to review the judgment and opinion of the 8th Circuit Court of Appeals and a summary reversal of the judgment in this petition should be granted.

Respectfully submitted,

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Pro Se.

APPENDIX A

Mary Jane Eaton, Appellant v Drake University & the United States of America, Appellees. No. 81-2015.United States Court of Appeals, 8th Circuit. Appeal from the United States District Ct. for the Southern District of Iowa. Submitted: Oct. 28 1981. Before GIBSON,Senir Circuit Judge, ROSS &STEPHENSON,Circuit Judges. Filed: Nov. 3, 1981.

PERCURIAM.

Appellant Mary Jane Eaton owns property on Forest Av. in Des Moines, Ia. which is located near Drake University's Fine Arts Center. For many years she has claimed that an outdoor air conditioning unit for the Fine Arts Center has emitted objectionable noises, fumes, etc, which substantially interfere with the use & enjoyment of her property.

Appellant was unsuccessful in an Iowa St. court action which sought damages and equitable relief for this alleged nuisance. In that action the Polk County District Court flatly

held that the air conditioning unit was not a nuisance & denied all requested relief. The Iowa Court of Appeals affirmen in a per curiam opinion & the Iowa Supreme Ct. allowed that decision to stand. Drake was the only defendant in that action.

Appellant then filed suit in federal Court, this time adding the united States as a defendant along with Drake U. On Oct. 28, 1980, the district court[1] entered summary judgment in favor of Drake U., holding that appellant's claims against Drake were barred by the doctrine of res Judicata.

On August 13, 1981, the district court entered summary judgment in favor of the United States, which partially funded construction of Drake University' Fine Arts Center via government grants, illegally failed to file an environmental impact statement concering the effect of the air conditioning unit on the area surronding its installation site. Appellant also claimed that she was denied due process. The

district court intially held that appellant's environmental claims for damages, which the district court considered to be based upon the Nat'l. Enviromental Policy Act(NEPA) 42 U.S.C § 4331 et seg. were beyond the federal court's Jurisdiction. The district ct. also held that, assuming arguendo thre was federal jurisdiction over appellant's NEPA claim, the United States' motion for summary judgment must be granted because under the circumstances an environmental impact statement was not required.

After careful consideration of the original district court file & the district couet's Oct.28, 1980, and Aug. 13,1981 memorandum decisions, we conclude that both district court decisions are based on factual findings which are not clearly erroneous. We also conclude that no error of law appears in the district court's Oct. 28, 1980 and Aug. 13, 1981 decisions. Therefore, the district court's judgments are affirmed.

See 8th Cir. R. 14.

[1]The Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa.

Affirmed. A true copy:: Atest: CLERK, U. S. COURT OF APPEALS, EIGHT CIRCUIT Not to be published.

APPENDIX B

Mary Jane Eaton, Plaintiff v Drake Univ. & United States Government, Defendants. Civil NO. 80-372 B In the United States District Court Southern District of Iowa; Central Division. Ruling on Motion to Dismiss, Treated as a motion for Summary Judgment, & Order of Dismissal.

FILED: Oct. 28, 1980.

Defendant Drake Univ.'s motion to dismiss filed Sept. 16, 1980 & ordered by this court to be treated as a motion for summary judgment, & plaintiff's resistance thereto, were heard by the undersigned Judge on Oct. 16,1980. Plaintiff appeared pro se & defendant Drake Univ. appeared by counsel.

Fed. R. Civ. P. 56(c) provides that the summary judgment sought "shall be rendered forthwith is the pleadings, depositions, answers to interogatories, & admissions on file, to gether with the the affidavits if any show that there is no genuine issue as to any material fact & that the moving party is entitled to a judgment as a matter of law."

It is undisputed that plaintiff has already litigated her cause of action in state court. She sueddefendant Drake Univ. on this same cause of action commencing in 1976 in the Iowa District Court in & for Polk County, Law CL 13-7267. The case was tried to a judge sitting without a jury on July 23, 1979. & the judge ruled against her. After a motion for new trial was overuled, she apealed. On June 24, 1980 the Iowa Court of appeals filed a percuriam opinion affirming the judgment of the trial court. She appealed to the Iowa Supreme Ct., which overuled & denied her application for futher review, & on Sept. 2,

1980, the Ia. Supreme Court issued the procendo based on the Ia. Court of Appeals' affirmance.

Defendant Drake University relies on the doctrine of resjudicata.

In Comm. of Revenue v Sunner, U. S. 591 (1947), the United States Supreme Ct. review-by certiorari a tax decision of the 8th Circuit involing fundamental issues of res judicata. The Court offered the following guidance on the subject of res judicata:

> It is first necessary to understand something of the recognized meaning & scope of res judicata, a doctrine judicial in origin. The general rule of res judicata applies to repetitious suits involing the same cause of action. It rests upon considerations of economy of judicial time & public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit & their privies are thereafter bound "not only as the every matter which was offered & received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." * * * The judgment puts anend to the cause of action which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating

> the judgment * * *. * * * Matters which were actually litigated & determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense res judicata is usually & more accurately referred to as estoppel by judgment, or collateral estoppel * * *."

Id. at 597. See also United States v Munsingwear, Inc., 340 U. S. 36 (1950): Hubbell v United States, 171 U. S. 203 (1898).

Plaintiff asserts in her complaint in this court a slightly new theory of her cause of action against defendant Drake Univ. However, a party "is not permitted to fragment a single cause of action & to litigate piecemeal the issues which could have been resolved in one action." Flynn v State Board of Chiropractic Examiners, 418 F. 2d 668, (9th Cir. 1969). Accord, International Prisoners Union v Rizzo, 356 F. Supp. 806, 810 (E.D, Pa, 1973) "The doctrine of res Judicata *** prevents splitting of a cause of action & requires all grounds upon which a single claim is based to be asserted & concluded in one action, on pain

of being barred from a seperate suit.")(Quoting Wright, Law of Federal Courts § 78, at 343 Vestal, State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court, 27 Okla. L. Rev. 185, 203-05 (1974).

Plaintiff bitterly complains that she did not obtain justice in the state courts & that were many irregularities in the state court proceedings. She complains about defendant Drake University's lawyer, she complains ab out lawyers who represented her, & she complains of conflict of interest on the part of the state trial judge, most of the judges of the Iowa Court of Appeals & the Chief Justice of the Iowa Supreme Court. She brings her complaints to the wrong forum, because it is not within the power of the Federal District Court to review the fairness of proceedings in state court.

Plaintiff has had her day in court & lost. She cannot now have another day in another court on the same cause of action. Her cause

of action. Her cause of action in this court is barred by the doctrine of res judicata.

Defendant Drake University's motion to dismiss is sustained & plaintiff's complaint against Drake University is dismissed.

DATED this 28th day of October, 1980

HAROLD D. VIETOR: United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF IOWA __CENTRAL CIVISION

MARY JANE EATON,PLAINTIFF, V UNITED STATES GOVERNMENT, DEFENDANT. Cicil No. 80-372-B. Ruling on Motion for Summary Judgment & order for Judgment.

This cause of action arises out of the construction of an air conditioning unit that cools Drake Univ."s Fine Art Center. Plaintiff alleges that the unit, which is adjacent her home constitutes a nuisance which should be abated & for which she is entitled to damages. After protracted litigation in both state and federal court, this court is presented with the

motion for summary judgment of the only remaining defendant, the United States Government. Plaintiff has filed a resistance.

Plaintiff's cause of action against the United States Government is predicated upon the lack of an environmental impact statemnet which plaintiff alleges violates 42U.S.C.§ 4332.[1] Plaintif also alleges that her right to due process of law has been violated. In support of its motion for summary judgment, defendant asserts that 42U.S.C.§ 4331, et seq. did not apply to agency action at issue in this case & that plaintiff has not been denied due process of las.

An initial matter however must first be resolved. This court is empowered only to hear actions that present a "case or controversy." Article lll, Un S. Constitution. Plaintiff's cause of action is predicated up the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331, et seq. The NEPA is a pro-

cedural statute that seeks th ensure the federal decision makers consider the environmental impact of their actions. See Atlanta Colition the Transp. Crisis, Inc. v Atlanta Regional Comm"n, 599 F.2d 1333,1344 (5th Cir.1979. A private party may not recover monetary damages under theNEPA nor does the Act provide a basis to obtain restitution for an alleged taking of property. See Pye v Dept. of Tranportation, 513 F.2d 290, 293(5th Cir. 1975). The statute, does not lie to abate nuisances & this court is not aware of any case in which it has been so applied. While the court has the authority to compel compliance with the statute, it is undisputed that the construction challenged in this case was completed in 1973, approximately seven years before this action was filed. As plaintiff is not entitled to monetary damages under the NEPA & since any claim for injunctive relief under the Act is moot, I conclude that this co-

urt does not have jurisdiction over plaintif's NEPA cause of action.

Assuming however that this court does have jurisdiction of the NEPA cause of action, the court nevertheless concludes that defendant's motion for summary judgment must be sustained.

Fed. R. Civ. P. 56(c) provides in part: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, & admissions on file, together with the affidavits, if any show that there is no genuine issu e as to any material fact & that the moving party is entitled to a judgment as a matter of law"

The following facts ar undisputed. In 1967, Drake Univ. received a grant under 20 U.S.C.§ 714 from the Office of Education for the construction of a fine arts bldg. The University however had some difficulty in obtaining the non-federal share of the construction

costs & the contract, in which the concurence of the Commissioner of Education was required 45 C.F.R.§ 170.3(c)(1966), was not let until May 28, 1970. Construction of the cooling tower at issue in this case began in Junel971 & was completed, but for balancing & testing, in Nov. 1971. The entire project was closed out & the concluding payment made under the grant in January 1973.

As discussed above, NEPA upon which plaintiff's cause of action is predicated, is a procedural statute that seeks to ensure that federal decision makers consider the environmental impact of their actions. See Atlanta Coalition on the Transp. Crisis Inc. v Atlanta Regional Comm'n, supra 599 F.2d at 1344. Section 4332 of that Act provides in relevant part:

> The Congress authorizes & directs that, to the fullest extent possible: (1) the policies, regulations, &public laws of the United States shall be interpreted & administered in accordance with the policies set forth in this chapter & (2) all agencies of the Federal Gov. shall--
>
> * * *
>
> (C) include in every recommendation or re-

port on proposals for legislation & other major Federal actions dignificantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) Alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment & the maintenance & enhancement of long-term productivity, and

(v) any irreversible & irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The focus of the NEPA is upon the decision making process. The relevant time, therefore, for applying the NEPA is prior to or shortly after the decisions of federal agencies leading to the construction of the project, not the constructions dates themselves. In this case, the only discernible federal actions at issue are the commissioner's concurrence in in the May 28, 1970, letting of the contract & the closing out & concluding payment under the the grant made in January 1973. The latter is not a major federal action significantly affecting the quality of the human environ-

ment. The Commissioner"s concurrence in the contract is arguably such an action & will be treated as such for the purposes of this motion.[2] The issue, in the context of defendant's motion, then becomes whether the NEPA's requirement of an environmental impact statement applies to the action of the Office of Education in concurring in the contract let on May 28, 1970.

The effective date of the NEPA & accordingly, section 4332, was January 1, 1970.[3] Congress, however in section 4333 gave federal agencies until July 1, 1971, "to bring their authority & policies into conformity with the intent, purposes, & procedures set forth in this chapter." 42 USC § 4333. The council on Environmental Quality (CEQ) promulgated interim guidelines on April 23, 1970. See 35 Fed. Reg. 7390(May 12, 1970). The CEQ guidelines set forth criteria to be applied in deciding whether a proposed action required the preparation of an environmental impact state-

ment & set a deadline of June 1, 1970, for agency compliance with the NEPA. The Dept. of Health, Education & Welfare (HEW) of which the Office of Education is a part, issued its first directive on the preparation of environmental impact statements for HEW-assisted construction in June 1971, with the requirement of environmental impact statements for academic facilities construction programs not appearing in the requlations until May 29, '73. See 38 Fed. Reg. 14096 May 29, 1973.

This case presents the issue of the applicability of the provisions of the NEPA to agency action taken after the effective date of the legislation but before the agency had brought its regulations into conformity with the act.

In Transcontinental Gas Pipeline Corp. v Hackensack Meadowlands Development Comm'm, 464 F 2d 1358 (3d Cir. 1972), cert. denied, fo9 U.S. 1118 (1973) the Third Cir Ct of Appeals addressed an almost identical issue.

In Transcon. Gas, the Federal Power Commission (FPC), without an enviromental impact statement, issued an FPC certificate to a company after the effective date of the NEPA but prior to the promulgation of guidelines or regulations by either the CEQ or the FPC. Id. at 1366. Noting that the NEPA was not to be applied retroactively, the court concluded that a flexible approach should be taken in applying the NEPA. Id. The court refused to require an environmental impact statement where the agency action while taken after the effective date, was taken before the agency regulations were promulgated. Id.

The only distinction in this case is that the CEQ Interim Guidelines had been published at the time contract was let. I do not, hover deem the existence of the CEQ guidelines to be controlling in this case. The agency regulations which would have provided more specific criteria & a procedure for the preparation & presentation of environmental

impact statements had not yer been promulgated. Indeed the CEQ guidelines ublished May 12, 1970 gave agencies until Junel, 1970, to establish.

> (their) own formal procedures for (1) identifying those agency actions requiring environmental statements, (2) obtaining information required in their preparation, (3) designating the officials who are to be responsible for the statements, (4) consulting with & taking account of appropriate Federal, State, & local agencies, & (5) meeting the requirements of section 2 (b) of Executive Order 11514 for providing timely public information on Federal plans & programs with environmental impact.

35 Fed. Reg. 7390, 7391 (May 12, 1970). Under these circumstances, I find that an environmental impact statement was not required.

Similarly, I find plaintiff's due process claim to be without merit. Plaintiff alleges no facts in support of a distinct due process claim against the defendant nor do the facts alleged with regard to the failure to require an environmental impact statem. state a due due process claim.

Defendant's motion for summary judgment

is sustained & the clerk is directed to enter judgment for the defendant.

DATED this 13th day oa August, 1981.

HAROLD D. VIETOR United States District Judge

FOOTNOTES

[1]In her pro se complaint, plaintiff asserts that 42 USC § 1858 requires an environmental impact statement. Section 1858, now codified in 42 USC § 7641, does not deal with environmental impact statements, nor does it creat a private cause of action. Viewing plaintiff's allegations liberally, I will view plaintiff's complaint, as has the defendant, to set forth a claim under 42 USC § 4331, et seq.

[2]Section 4332 (c) applies only to "major Federal actions significantly affecting the quality of the human environment." 42 USC § 4332 (c). The concurrence of the commissioner is required before advertising for bids & before awarding the contract. 45 C.F.R. § 170.3(c)(1966). The requirement, although appearing in section requiring competitive biding, 45 C.F.R. § 170.3 (1966), does not articulate what grounds on which the commissioner's concurrence is to be based. The Commissioner's concurrence is not required as a conditionfor grant approval, see 45 C. F. R. § 170.13 (1966), & indeed, the grant in this case was awarded to Drake University in 1967.

The parties have not addressed the question of wether the approval of the contract by the commissioner is a "major Federal action" within the meaning of section 4332(2). However as I conclude that an environmental impact statement was not required, even assuming the action to be within section 4332 (C), I do no more than raise the issue. I need not decide it at this time.

[3]The National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 et seq., does not have an express effective date. In the absence of such a date, the general rule is that an act of Congress takes effect on the date of enacment, or, in the case of the NEPA, on January 1, 1970. See United States v Gavrilovic 551F.2d 1099, 1103 (8th Cir. 1977).

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PROOF OF SERVICE

I Mary Jane Eaton Certify that I am for Mary Jane Eaton and I served the foregoing instrument by mail or personal delivery upon persons listed above. Jan. 18 1982

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Opposition

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No. 81-1364

In the Supreme Court of the United States

October Term, 1981

MARY JANE EATON,
Petitioner,

vs.

DRAKE UNIVERSITY AND UNITED STATES GOVERNMENT,
Respondents.

BRIEF OF RESPONDENT, DRAKE UNIVERSITY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented by Petitioner are not proper grounds for review because none of the questions come within the Considerations Governing Review on Certiorari as provided in Rule 17 of the Supreme Court Rules.

The proper questions before this court are:

1. Was Petitioner's claim against Respondent Drake University barred by the doctrine of res judicata as held by the Federal District Court and affirmed by the Court of Appeals for the Eighth Circuit?

2. Was the district court's judgment against Petitioner on her claim for environmental damages and affirmed by the Court of Appeals, based upon factual findings which were not clearly erroneous?

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STATEMENT OF THE CASE

A. Nature of Case, Course of Proceedings in Iowa State Courts and United States Federal Court in Iowa and Disposition in State and Federal Courts

This civil action was brought in the United States District Court for the Southern District of Iowa by Petitioner against Drake University and the United States Government claiming that Drake created a nuisance by the operation of its air conditioning equipment serving Drake University Fine Arts Center. Petitioner prayed for a decree abating the nuisance and permanently enjoining Drake from operating its plant in such a way to create such nuisances; Petitioner further prayed for damages in the amount of $20,000.00.

Petitioner previously litigated the same issues against Drake University in the Iowa Courts, namely, the Polk County Court, the Iowa Court of Appeals and the Iowa Supreme Court. Petitioner failed to establish her claims in every instance and judgment was finally affirmed dismissing Petitioner's case and procedendo was issued by the Iowa Supreme Court on September 2, 1980.

Respondent Drake University filed its motion for summary judgment in the Federal Court action based upon the doctrine of res judicata. The Honorable Harold D. Vietor sustained Drake's motion and dismissed Petitioner's complaint against Respondent Drake University on October 28, 1980.

Respondent United States' motion for summary judgment was sustained on August 13, 1981, on the ground that Petitioner's claims for damages based upon the National Environmental Policy Act (NEPA) 42 U.S.C. §§4331 *et seq.* were beyond the Federal Court's jurisdiction. The district court also held that, assuming arguendo there was federal jurisdiction over Petitioner's NEPA claim, the United States' motion for summary judgment must be granted because under the circumstances an environmental impact statement was not required.

B. Statement of Relevant Facts

Petitioner is a resident of Des Moines, Polk County, Iowa, and the owner of property described as the East 39.5 feet of Lot 78, University Place, locally known as 2510 Forest Avenue, Des Moines, Iowa. Petitioner's residence is located in a C-1 commercial district under the applicable zoning ordinance of the City of Des Moines. Petitioner's property fronts on Forest Avenue. Forest Avenue is a busy commercial street. Traffic is heavy at times. Business establishments are on both sides of Forest Avenue

both east and west of Petitioner's residence. Petitioner's residence had an assessed value for tax purposes of $10,-860.00 as of 1978. It is ten feet four inches from the curb line of Forest Avenue. An alley abuts the east side of Petitioner's residence. On the south, Petitioner's residence is eight feet four inches from the property line of Respondent Drake University. Petitioner's residence is approximately 140 to 150 feet north of the cooling tower of the Drake University Fine Arts Center. Petitioner's occupancy of her residence predates the Drake Fine Arts Center which was completed in 1972.

The Drake Fine Arts Center occupies the Des Moines City block which is bounded on the north by Forest Avenue, on the west by 26th Street, on the east by 25th Street and on the south by Carpenter Avenue. Petitioner's residence and one other are the only private residences in the block at the present time.

The Drake University Fine Arts Center was completed in 1972 and is used for educational and cultural purposes. The building contains classrooms and facilities for the production of musical and dramatic events, among other things. It was designed by a renowned architect and planned by Respondent Drake University to be a fine addition to its campus and to the Des Moines community. The mechanical and electrical equipment, including air conditioning, was designed by skilled architects and engineers and at the time it was installed was the best available on the market. Similar equipment is in use in similar buildings all over the United States. Since 1972 the air conditioning serving the Fine Arts Center has been continuously improved and upgraded from time to time. The most recent improvement was completed in the spring of 1979. As a practical matter, nothing more can be done to quiet the small amount of remaining noise emitted by

the cooling tower. The cooling tower of the Respondent Drake University air conditioning equipment emits neither odors, dust nor exhaust fumes. The only emission is water mist that is discharged directly into the air above the unit.

The Respondent Drake University's air conditioning equipment and cooling tower are operated commencing with the advent of the hot weather in the spring and through the summer weather into the fall. It is not operated in early spring, winter or late fall. Its normal operations are during daylight hours and occasionally during the evening. Seldom, if ever, is it operated after midnight and before 6:00 A.M.

Scientific tests have been made and recorded with respect to the noise emissions of the Respondent Drake University air conditioning cooling tower. On May 21, 1973, Fluid Engineering Services recorded a reading of 65 d.b.a at Petitioner's property. On July 9, 1979, similar readings were taken between 1:30 P.M. and 3:00 P.M. At that time and place, 52.5 d.b.a. reading was recorded. On July 18, 1979, at 12:00 P.M. a reading was taken at the same place and reading of 52 d.b.a. was recorded. At 6:30 A.M. on July 19, 1979, a reading of 53 d.b.a. was recorded. All of the d.b.a. readings were taken when the cooling tower and air conditioning equipment were in full operation. The sound readings on all three occasions were made by a PRUEI and KJOER sound meter, a very accurate instrument and the best available.

The Des Moines Noise Ordinance was enacted by the City Council of the City of Des Moines on August 28, 1978, and amended on October 23, 1978. Under said ordinance, in a commercial C-1 zoning category, sound emissions of 65 d.b.a. and below are permissible. There is no evidence that Respondent Drake University's equipment emitted sound

in excess of 65 d.b.a. measured at Petitioner's property at any time.

The sound emitted by Respondent Drake University's air conditioning equipment was not offensive to the senses nor an obstruction to the free use of property so as essentially to interfere with the comfortable enjoyment of life or property by Petitioner.

The Respondent Drake University cooling tower has no obnoxious exhaust and no offensive smells. There is no evidence of any physical injury or diminution of market value to Petitioner's house.

ARGUMENT

Respondent has had her day in court and lost. Her cause was fully litigated in the District Court of Polk County, Iowa. Her motion for new trial was overruled. On appeal to the Iowa Court of Appeals, the judgment of the trial court was affirmed. Petitioner appealed to the Iowa Supreme Court, which overruled and denied her application for further review.

Petitioner's claims of bias on the part of her own counsel, counsel for Respondent Drake University, the Trial Court judge and the judges of the Court of Appeals were all rejected by the Supreme Court of Iowa.

Petitioner's suit in Federal Court duplicated her claims asserted in state court except that she added the United States Government as a party defendant and added the claim of environmental damages. The Federal District Court recognized that Petitioner in her complaint asserted a slightly different cause of action against Drake University but properly held that she could not fragment a single

cause of action and litigate piecemeal the issues which could have been resolved in one action.

Petitioner's due process claim is without merit in that she has alleged no facts in support of a due process claim against Respondent Drake University nor do the facts alleged with regard to the failure to require an environmental impact statement state a due process claim.

The Petition for writ of certiorari does not come within any of the Considerations Governing Review On Certiorari as provided in Rule 17 of the Supreme Court Rules.

CONCLUSION

The judgment of the Eighth Circuit in affirming the Federal District Court was correct in holding that the doctrine of res judicata barred Petitioner's claim and the record clearly indicates that there was no violation of the National Environmental Policy Act. The lower court was clearly correct and the writ of certiorari should be denied.

Respectfully submitted,

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No. 81-1364

In the Supreme Court of the United States

OCTOBER TERM, 1981

MARY JANE EATON, PETITIONER

v.

DRAKE UNIVERSITY AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner, who lives in a house near the Fine Arts Center of Drake University, brought this action against the University and the United States government to abate what she contends is a nuisance—the outdoor air conditioning unit that cools the Center—and to recover damages for the alleged nuisance (Pet. App. 9). Her claim against the United States rested essentially on the failure of the federal agency that granted funds in aid of the Center's construction to prepare an Environmental Impact Statement (EIS), pursuant to Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. 4332(2)(C), before approving the financial assistance (Pet. App. 10, 12-13). The grant was made in 1967; the construction contract was let in 1970; the cooling unit was completed in November 1971; and final payments on the facility were made in 1973 (*id.* at 12-13). Petitioner brought this suit seven years later (*id.* at 11).

The district court held (Pet. App. 10-12) that it lacked jurisdiction over petitioner's claim because NEPA provides no basis for damages or for an injunction to abate a nuisance and because petitioner's claim that the agency should have prepared an EIS before approving federal assistance for the construction of the Center with its cooling unit was moot, the project having long since been completed. The court also held (*id.* at 12-18) that, even assuming arguendo that it had jurisdiction, the federal defendant was entitled to summary judgment on the ground that the only arguable "major federal action" (denoting the event that triggers an agency's duty to prepare an EIS) was the concurrence by the United States Commissioner of Education in the letting of the construction contract in 1970 (*id.* at 14-15), and that event occurred before the Department of Health, Education, and Welfare (the parent agency) had promulgated regulations establishing procedures for carrying out the requirements of NEPA.[1]

The court of appeals affirmed in a per curiam opinion, noting simply that the district court had made no clearly erroneous factual findings and no errors of law (Pet. App. 1-3).

2. The decisions below are correct and the petition raises no issue warranting review by this Court.

The National Environmental Policy Act, which is designed to ensure that federal decisionmakers act on the basis of adequate information concerning the environmental consequences of their actions, and which therefore requires that certain procedures be followed before agencies

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[1]The court also dismissed a due process claim against the government, noting (Pet. App. 18) that petitioner had alleged no facts in support of the claim. Her claim against Drake University was dismissed on grounds of *res judicata* because it represented an attempt to relitigate issues decided against her in a prior state court action (Pet. App. 5-9).

undertake action likely to produce significant effects on the environment, is not a nuisance remedy and does not provide a basis for a private damage action. *Noe* v. *Metropolitan Atlanta Rapid Transit Authority*, 644 F. 2d 434 (5th Cir. 1981), cert. denied, No. 81-5435 (Dec. 14, 1981). Where, as here, the project has been completed long before the suit raising the NEPA claim is brought, the plaintiff is not entitled to relief under the statute. See *Jones* v. *Lynn*, 477 F. 2d 885, 889 (1st Cir. 1973). See also *Save Our Wetlands* v. *United States Army Corps of Engineers*, 549 F. 2d 1021, 1026 (5th Cir.), cert. denied, 434 U.S. 836 (1977). The district court thus properly found petitioner's claim moot.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1982

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[2]We do not concede that the involvement of the Commissioner of Education in the construction of the Fine Arts Center's cooling unit rose to the level of a "major Federal action[]" within the meaning of 42 U.S.C. 4332(2)(C), since there were severe constraints on the Commissioner's discretion under the Higher Education Facilities Act of 1963, 20 U.S.C. (1964 ed. & Supp. V 1969) 714, 718, to decline to allot funds for the construction of university facilities where the appropriate state agency had approved and certified the project. See 20 U.S.C. (1964 ed. & Supp. V 1969) 714(b), 718(b); *NAACP* v. *The Medical Center, Inc.*, 584 F. 2d 619, 633 (3d Cir. 1978). The district court did not decide the question (Pet. App. 19 n.2) because it found the complaint deficient on other grounds, as noted above.